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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

vs.

SERGE RUBINSTEIN

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (R. 19-29) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 11, 1953. The petition for a writ of certiorari was filed on August 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253(1).

Questions Presented

1. Whether, in view of the fact that the Court of Appeals remanded the cause for further proceedings in order to "avoid piecemeal appeals", review by the Supreme Court is warranted at this stage.

2. Whether declaratory judgment actions may be filed subsequent to the effective date of the Immigration and Nationality Act of 1952 to review deportation orders.

3. Whether injunctive relief may be granted in such declaratory judgment actions to preserve the *status quo*, to maintain the court's jurisdiction, and to prevent threatened illegal action by the Attorney General in revoking an alien's bond arbitrarily and without cause.

Statutes Involved

The principal statute involved is Section 242(c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U.S.C.A. 1252-c) which reads in part as follows:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney Geenral is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311) provides in part as follows:

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Statement

Respondent is a stateless native of Russia who has no right to enter any foreign country and there is no place to deport him. He lawfully entered the United States for permanent residence on April 3, 1938. His deportation

was ordered on December 29, 1952 upon the ground that he was convicted of violation of Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311), within five years subsequent to his reentry in 1939 (R. 1-5).

On December 30, 1952, respondent filed this action for declaratory judgment and moved for a preliminary injunction to prevent his deportation and the threatened revocation of administrative bail by the Attorney General (R. 1-5). The deportation order is attacked as null and void in the complaint which alleges that (1) matters outside the record were considered and respondent was denied a fair hearing; (2) the order of deportation failed to specify the place of deportation and no hearing has been granted upon this vital issue; and (3) the respondent was not convicted of a crime involving moral turpitude.

Injunctive relief was sought to restrain the Attorney General from disturbing the *status quo*, arbitrarily revoking the respondent's bail without cause as he threatened to do, and to prevent respondent's incarceration as long as it appeared that there was no place to deport him (R. 5-7) and that he was not endangering the public by being at large—a fact conceded by the Government (R. 17).

No answer or opposing affidavits were submitted by the Government when the matter was before the Court of Appeals. (Petitoner has since filed an answer in the District Court but this does not appear in the present record.) Upon the first appeal of this cause to the Court of Appeals from a denial of a restraining order, a temporary restraining order was entered and the appellate court reversed the District Court's conclusion that *habeas corpus* was the exclusive remedy (R. 8). No attempt was made by the Government at that time to apply for certiorari, although the Court of Appeals specifically found that a declaratory judgment action might be maintained. Upon the second appeal to the Court of Appeals from a denial of injunctive relief,

the Court of Appeals affirmed its previous ruling that jurisdiction existed to entertain a declaratory judgment action. A temporary injunction was granted to restrain the petitioner's arbitrary revocation of respondent's bail. In so doing the Court of Appeals refused to rule upon the several issues raised on the merits, noting that it desired to avoid piecemeal appeals (R. 27).

Argument

1. Since the judgment of the Court of Appeals was not a final judgment, but one remanding the case to the District Court for further proceedings (without ruling upon the various issues raised on the merits—in order to avoid piecemeal appeals), there is no reason for this Court to consider the questions raised by the petition for certiorari at this time. If petitioner is successful in the District Court upon the merits of the case, the other questions presented herein may well become moot. If he is unsuccessful, his right to petition for certiorari at a later time will not be prejudiced by its denial now. *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 91; *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (1951 Ed.), Sec. 130, pp. 233-234.

Normally, this Court has granted certiorari to review non-final judgment in an extremely limited class of cases, as where the issue raised is of "peculiar gravity and general importance" (*Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258); or "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Construction Co.* v. *Jacksonville, T. & K. W. Railway Co.*, 148 U. S. 372, 384), or where an important question of subject matter jurisdiction is raised relating to the power of federal courts to exercise authority over persons incarcerated overseas. (*Johnson* v. *Eisentrager*, 339 U. S. 763.)

In this case, the courts below clearly had subject matter jurisdiction to review an order of deportation. The sole question relates to whether it should be in *habeas corpus* or declaratory judgment. Upon the first appeal to the Court of Appeals in January, 1953, the Government did not deem the question of sufficient importance or urgency to apply for certiorari. No greater need exists today. The Court of Appeals properly refused to pass upon all the issues of the case upon the record before it which does not even contain an answer. Piecemeal appeals will be avoided and no prejudice will result to the parties by denying certiorari at this time.

This argument was vigorously and successfully urged by the Government in opposing certiorari in *Machado* v. *McGrath*, 342 U. S. 948 (October Term, 1951, No. 530, pp. 6-7, Government Brief). The Government should not receive any more favored treatment than Machado in applying for a writ of certiorari.

2. Moreover, it is submitted that the Court of Appeals correctly analyzed the legislative history of the 1952 Immigration and Nationality Act and that its conclusion that it permits and authorizes declaratory judgment is amply justified (R. 21-24). No conflicts have developed in any of the Circuits upon this issue and although the Government disagrees with the conclusion, it believes that the result is a desirable one. Accordingly, it has recommended legislation to permit declaratory judgment actions in deportation cases. (Government's Brief, *Martinez* v. *Neely*, p. 46, note 12, October Term, 1952, No. 218.)[1] The Government's legis-

[1] On September 24, 1953, the Attorney General in his report to the Judicial conference of the United States, stated:

> "While the Government has filed a petition for a writ of certiorari in this case *(Rubinstein* v. *Brownell)*, we think the Congress should spell out a method of obtaining judicial review in the district court for any alien against whom a final order of deportation has been issued, whether he is in custody or not."

lative program may well render moot the jurisdictional issue herein. This possibility is added grounds for scrutinizing the necessity of granting review at this time, in advance of final judgment. We submit that the "peculiar gravity and general importance" of the issue herein has not been demonstrated. On the contrary, it affirmatively appears that this case should be governed by the general rule that non-final judgments should not be reviewed by this Court.

3. On the present state of the pleadings, it appears that the jurisdictional issue (Question 1 of the Petition) is the only one that may warrant consideration at the appropriate time. Should this Court, contrary to the views expressed above, grant certiorari, we submit that it should be limited to the jurisdictional issue herein. It is clear that deportation proceedings are civil in nature (*Harisiades* v. *Shaughnessy*, 342 U. S. 580) and that we are not here concerned with enjoining a criminal prosecution as was the case in *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163 (Pet. p. 17). On the unopposed pleadings herein, the Court of Appeals was clearly justified in enjoining an unauthorized revocation of bail. The Court below properly found that respondent would appear when required and that his presence at large would not endanger the national security or the public peace. In fact, such were the admissions of the Government (R. 17, par. 4). Accordingly, it was appropriate for the Court below to find that the revocation of bail, without any basis for such action, was contrary to law and contrary to the principles enunciated by this Court in *Carlson* v. *Landon*, 342 U. S. 524 (R. 25-26). An illegal revocation of bail by the Attorney General in a civil proceeding, and an attempt to enforce an illegal order of deportation may be enjoined even as any other illegal order of a cabinet officer is subject to restraining action by the judiciary. *Work* v. *Louisiana*, 269 U. S. 250, 254. Injunctions to preserve the

status quo pending judicial review are likewise generally accepted and normal procedure. *M. K. T. Railway Co.* v. *Brotherhood of Railway Trainmen*, 188 F. 2d 302 (C. A. 7). This issue therefore was correctly decided below. More important, it is not of such moment that Supreme Court review is warranted. Injunctions to preserve the *status quo* or to restrain cabinet officers present no novel or unusual principle of general application. No conflicts with decisions of this Court or other circuits are involved. Basically, the issue here is whether an injunction is appropriate to enjoin the Attorney General from revoking an alien's bail without cause. We submit that the injunction was properly issued to prevent such illegal action and to maintain the status quo existing at the inception of the litigation. Review on this issue is therefore not warranted.

The pith of the Government's argument on this point is that the 1952 Act in conferring jurisdiction on the courts to decide the merits of the action simultaneously withholds power to grant any interlocutory relief from a threatened or actual arbitrary and unconstitutional arrest and detention for deportation. In the absence of most compelling statutory language, not present here, the Act should not be construed as withholding the ancillary interlocutory powers which are a traditional and inseparable part of jurisdiction to decide the merits of the controversy. Moreover, the Government asserts this position that the respondent must be relegated to the uncertain and limited remedy of Section 242(c) of the Act in this case in which the Government concedes that public interest does not require detention and in which there is no place to which the respondent may be deported if he were in detention. The gist of the Government's position is that the respondent shall be detained indefinitely without any need or reason for such detention being suggested pending futile efforts to find a place of deportation or pending final decision on his efforts to obtain

release under the uncertain remedy provided by Section 242(c). It is submitted that for the court below to grant interlocutory relief in this situation was certainly a proper exercise of its discretion, if not the only proper course to follow, and this Court will not review that exercise of discretion pending determination of this action.

4. The Government in its petition refers to but does not expressly request review of the question whether the Attorney General has arbitrary powers over the detention of aliens. The claim of such arbitrary powers by the Government is not only contrary to the constitutional principles enunciated in *Carlson* v. *Landon*, 342 U. S. 524, but has been specifically rejected in every case in which it has been asserted under the 1952 Immigration and Nationality Act. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C. A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953) and *Rubinstein* v. *Brownell*, No. 11,683 (C. A. D. C. 1953). This unusual claim of arbitrary powers, so at variance with our constitutional and democratic concepts, is unworthy of review.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.